

No.80704-3

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT,

V.

JEFFREY S. BROOKS, PETITIONER,

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
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REPLY TO RESPONDENTS,
RESPONSE TO PETITIONER'S MOTION FOR
DISCRETIONARY REVIEW OF PERSONAL RESTRAINT PETITION

JEFFREY S. BROOKS, PETITIONER
WASHINGTON STATE PENITENTIARY
1313 N. 13th Ave.
WALLA WALLA WASH. 99362
pro se Petitioner.

A.

IDENTITY OF PETITIONER

Petitioner, Jeffrey S. Brooks pro se petitioner, and in compliance with the court's request for a reply brief to the respondent's, response to petitioner's motion for discretionary review.

B.

DECISION BELOW

The Court of Appeals erroneously dismissed petitioner's personal restraint petition.

C.

ISSUES PRESENTED FOR REVIEW

(i). Can the court sentence a defendant to the statutory maximum term of 120 months of (" Total Confinement ") with an additional 18-36 months of community custody ?

(ii). Can the Court consider a defendant's potential to earn good-time credits, when a statutory maximum sentence is imposed in conjunction with community custody ?

(iii). What is the appropriate remedy to reflect that a sentence including community custody cannot exceed the statutory maximum ?

D.

STATEMENT OF THE CASE

Petitioner Brooks was convicted of three counts of attempted robbery in the first degree and one count of residential burglary;

All of which are ("Class-B") felonies with a 120-month maximum sentence. Brooks' standard range on each count is listed as 96.75-128.25 months, the court also ordered a period of community custody, as determined by the department of corrections, of 18-36 months on all counts. Petitioner originally sought post-conviction relief CrR 7.8(b)(4) in Whatcom County Superior Court which then transferred the case to the Court of Appeals as a personal restraint petition No. 60255-1-I. On the 6th day of September, 2007, the Court's acting Chief Judge dismissed Brooks' ~~Perss~~ restraint petition under RAP 16.11(b). Brooks filed a motion for reconsideration, which was transferred to the Washington State Supreme Court to be treated as a motion for discretionary review. See Supreme Court Commissioner's ruling, Jan, 3, 2008. The Commissioner requested the State to respond to the motion for discretionary review and suggest an appropriate remedy, if any, to the issues presented by Brooks. The State filed a response to Brooks' motion for discretionary review on the 17th day of Jan. 2008.

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ARGUMENT

Petitioner, Jeffrey S. Brooks, was sentenced to the "Statutory Maximum" term of 120 months ("Total Confinement") in the Department of Corrections, section 4.5(a) of the Judgement and Sentence. The court also sentenced Brooks to an additional 18-36 months of community custody, essentially giving Brooks a sentence of 138-156 months. The term of community custody, exceeds the statutory maximum. RCW 9.94A.030(47) Defines "Total Confinement" as confinement inside the physical boundries of a facility or institution operated or utilized under contract by the State or any other unit of Government for twenty-four hours a day, or pursuant to RCW 72.64.050 and 72.64.060. RCW 9.94A.030(45) Defines "Statutory Maximum" as the maximum length of time for which an offender may be confined as punishment for a crime as prescribed in chapter 9A.20 RCW, RCW 9.92.010, the statute defining the maximum penalty for a crime. RCW 9.94A.030(6) "Community Custody Range" means the minimum and maximum period of community custody included as part of a sentence under RCW 9.94A.715, as established by the commission or the legislature under RCW 9.94A.850, for crimes committed on or after July 1st,2000.

RCW 9.94A.030(5) "Community Custody" means that portion of an offender's sentence of confinement "in lieu of" earned early release time served in the community subject to the controls placed on the offender's movement and activities by the Department. Petitioner, asserts that the language, "because prisoner's who earn early release credits, and transfer to community custody status ("in lieu of") earned early release or imposed pursuant to RCW 9.94A.505(2)(b), served in the community and subject to controls placed on the offender's movement and activities by the department is ambiguous in the sense that the words "in lieu of" is susceptible to more than one interpretation. The phrase (Community Custody "in lieu of" earned early release) is ambiguous in the sense that it offers community custody and or early release and is misleading. In lieu of. Instead of or in place of; in exchange or return for < the creditor took a note in lieu of cash >, Black's Law Dictionary, Eighth edition. In lieu of. In substitution for or in place of. Ballentine's Law Dictionary Third Edition. Brooks also asserts, The Rule of Lenity applies to this ambiguous phrase "In lieu of." W.D. Wash. 1992. "Rule of Lenity" requires that where there is ambiguity in criminal statute, doubts are to be resolved in favor of defendant.--U.S. v. Petrykievich 809 F.Supp. 794--Statut 241(1).

If criminal statute is susceptible to more than one interpretation, "rule of lenity" requires interpretation most favorable to criminal defendant. State v. Dunn, 82 Wn.App.122 916 P.2d 952 State v. Riles,135 Wn.2d.326, 957 P.2d 655 State v. McGee,122 Wn.2d 783, 864 P.2d 912 State v. Martin,102 Wn.2d 300 State v. Gore,101 Wn.2d 481.

The presumptive sentence ranges for "total confinement" do not include periods of community placement there is no legislative statement of intent whether community placement is included within or is in addition to the (Standard range Sentence RCW 9.94A.030(44)). As our Supreme Court noted in Bernhard, the definition of standard range is not precise: Although somewhat ambiguous on the issue, the statutory language suggests that 'standard range' is a multifaceted concept embracing both the duration and conditions of the sentence imposed. "Bernhard, at 538. State v. Bernhard, 108 Wn.2d. 527,538, 741 P.2d.1(1987). RCW 9.94A.030(18)" A determinate sentence must state with exactitude the number of actual years, months, or days of "Total Confinement", of partial confinement, of community supervision, the number of actual hours or days of community service work, or dollars or terms of a fine or restitution. The Court of Appeals in both Vanoli and Sloan erroneously concluded that because

prisoner's who earn early release credits, and transfer to community custody status in lieu of earned early release, have not yet served the maximum. Vanoli, 86 Wn.App. at 655 937 P.2d 1116; State v. Sloan, 121 Wn.App. 220, 87 P.3d 1214.

Taking good-time into account when setting the length of a sentence is improper. Fisher, 108 Wn.2d at 429n.6 Under the SRA, earned early release time may be considered only after the offender has begun serving his sentence. See RCW 9.94A.728(1), 9.94A.150(1). Moreover, it would be inappropriate to impose a sentence outside the standard range based on an entirely speculative prediction of the likely behavior of an offender while in confinement. Fisher, 108 Wn.2d at 429. State v. Ross, 71 Wn.App. 556, 861 P.2d 473, 883 P.2d 329. an analysis of this nature is not permitted. State v. Fisher, 108, Wn.2d 419(1987). Goodtime plays no roll until confinement begins and credits are earned. RCW 9.94A.150(1). There is no guarantee credits will ever be earned either because the prisoner fails to qualify or because the legislature alters the rules State v. Ross, 71 Wn.App 556; State v. Buckner 74, Wn.App 889. RCW 9.94A.7281 legislative declaration-earned early release time is not an entitlement. The legislature retains full control over the right to revise the percentages of earned release time

available to offender's at any time. In State v. Jones, 118 Wn.App.199, 96 P.3d 258 the court reconized that since 1981, the SRA has been amended by 175 session laws, an average of almost eight per year! It has become so astoundingly and needlessly complex that it cannot possibly be used both quickly and accurately. It is extremely difficult to identify what statute applies to a given crime, much less to coordinate that statute eith others that may be related. The situation was recognized but not remedied- it may even have been exacerbated-by wholesale recodifications in 2001. The SRA screams for thoughtful simplification. Brooks further asserts that even if he is transfered to community custody, Brooks will still be subject to the same enhanced penalties as if he were serving a sentence of "total confinement". RCW 9.94A.634 Procedure-penalty gives the department complete control over the offender. The offender must comply with all orders, abey curfew which is essentially partial confinement the offender is subject to warrantless searches of his residence and or person. A defendant is no less restricted when he is under community placement, particularly community custody, as when incarcerated. Defendant's who commit crimes while on community placement are subject to enhanced penalties. State v. Miles, 66 Wn.2d 1012(1992).

Brooks asserts that the sentence imposed by the court is clear error in light of the United States Supreme Court's holding in *Blakely V. Washington*, ___ U.S. ___, 124 S.Ct.2531, 159 L.Ed.2d 403(2004). The *Blakely* court found that the Sixth Amendment right to jury trial makes unconstitutional the imposition of any sentence above the statutory maximum prescribed by the facts found by a jury or admitted by the defendant. *Id.* at 2536. Under the Washington Criminal Code, Attempted Robbery in the First Degree is a class B felony that carries a maximum statutory sentence of ten-years. *Id.* The Washington Sentencing Reform Act (the Washington Act) further limited the sentencing range to 96.75-128.25 months. The 128.25 months clearly violated the statutory maximum of 120 months, thus Brooks was sentenced to the statutory maximum of 120 months. *Id.* The Washington Act, however permits the judge to impose a sentence above that range upon finding "substantial and compelling reasons justifying an exceptional sentence." *Id.* (citing Wash. Rev. Code 9.94A.210(2)).

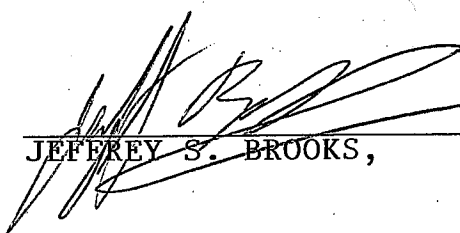
CONCLUSION

Because Brooks' sentence and judgement not only fails to clarify that the term of community custody cannot exceed the statutory maximum Brooks' sentence must be vacated because Brooks was sentenced to the statutory maximum term of "Total Confinement," the sentence and judgement does not reflect that Brooks sentence is a determinate sentence, the presumptive sentence ranges for total confinement do not include periods of community placement and there is no legislative statement of intent whether community placement is included within or is in addition to the standard range sentence. Brooks also asserts that the sentence must be vacated and remanded for resentencing because of the ambiguous phrase "in lieu of" offers two-options, one of which is earned early release and or community custody, not both, thus making the statute susceptible to more than one interpretation. The state's argument of a prisoner earning goodtime is a misplaced argument based on the decision of this court in State v. Fisher, 108 Wn.2d. Because the Court of Appeals Division I affirmed State V. Zavala-Reynoso, 127 Wn.App at 124. In dismissing Brooks' Personal Restraint Petition Id. COA# 60255-1-I RP-3. This Court should apply Res-Judicata because the court of appeals is a court of competent jurisdiction and they rendered a final judgment in dismissing Brooks' PRP.

Their judgement is conclusive of the causes of action and of the facts or issues litigated. 46 AmJur.2d judgments § 514. If this court remands this case to the Superior Court for resentencing Brooks believes that the proper remedy is to reduce his sentence by 36-months applying the Rule of Lenity. This case should be vacated and remanded for resentencing.

RESPECTFULLY SUBMITTED ON THIS 12, DAY OF FEBURARY 2008.

JEFFREY S. BROOKS #634437
SUPREME COURT CAUSE # 80704-3
WASHINGTON STATE PENITENTIARY
1313 N.13th Ave.
WALLA WALLA, WA..99362



JEFFREY S. BROOKS,

State of Washington
Respondent

80704-3
NO. 80704-3
AFFIDAVIT OF SERVICE
BY MAILING

I, Jeffrey S. Brooks, being first sworn upon oath, do hereby certify that I have served the following documents:

Petitioners Response to States
Response Discretionary Review

Upon:

Whatcom Co. Prosecutors office
Washington State Supreme Court

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
08 FEB 15 AM 7:54
BY RONALD K. CARPENTER
CLERK

By placing same in the United States mail at:

WASHINGTON STATE PENITENTIARY
1313 NORTH 13TH AVENUE
WALLA WALLA, WA. 99362

On this 12 day of February, 2008

Jeffrey S. Brooks
Name & Number

634437

Affidavit pursuant to 28 U.S.C. 1746, Dickerson v. Wainwright 626 F.2d 1184 (1980); Affidavit sworn as true and correct under penalty of perjury and has full force of law and does not have to be verified by Notary Public.